91-1817

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CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

_____ TERM

ADAM CAB, INC. d/b/a
ADAM CAB COMPANY,
Appellant

v.

MARCUS E. COLLINS, SR.,
STATE REVENUE COMMISSIONER,
STATE OF GEORGIA
Appellee

ON APPLICATION TO THE SUPREME COURT
OF THE STATE OF GEORGIA FOR
DISCRETIONARY APPEAL

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where the State Revenue Commissioner promulgated Revenue Regulation 560-12-2-.84(7)(b) imposing the responsibility for the collection and remittance of sales tax on passenger fares upon taxi cab companies rather than their leasehold operators over whom they have no control or power to enforce reporting, collection or remittance of the tax and thereby place the responsibility on taxi cab companies with leasehold drivers for the improper conduct of another did this deprive them of their property in violation of the due process clauses of the United States and the State of Georgia Constitutions?

TABLE OF CONTENTS

Questions presented for Review ... Page 1

Table of Contents ..... Page 2

Table of Authorities ..... Page 3

Opinions delivered by Other Courts ..... Page 6

Grounds for Jurisdiction ..... Page 8

Constitutional provisions and Regulations involved ..... Page 10

Statement of the Case ..... Page 18

Argument ..... Page 26

Certificate of Service ..... Page 40

All parties to this proceeding and all parent companies and nonwholly owned subsidiaries are included in the caption of the case.

TABLE OF AUTHORITIES

Statutes

5th Amendment to the Constitution of the United States of America 13, 24

14th Amendment to the Constitution of the United States of America 14, 24

Article I, Section I, Paragraph I of the Constitution of the State of Georgia 15, 25

Article I, Section I, Paragraph II of the Constitution of the State of Georgia 15, 25

Official Code of Georgia § 48-8-1 et seq. 16

Regulations

State of Georgia Revenue Regulation 560-12-2-.84(2) 10, 25

State of Georgia Revenue Regulation 560-12-2-.84(7)(b) 1, 11, 18, 28

Case Law

Alabama v. Advertiser Co.,
337 So2d 942 28

Buchanan v. Heath, 210 Ga 410,
80 SE2d 393 32

Cole v. Peachtree Cab Co.,
121 Ga.App. 177, 173 SE2d 278 35

Collins, Commissioner v. Adam Cab, Inc.,
261 Ga. 305, 404 SE2d 560 ..... 21, 36

Corbin v. Commissioner, 307 Minn. 237,
240 NW2d 809 27

Corley v. Lewless, 227 Ga. 745 ... 31, 34

Employment Security Commissioner of Wyoming v. Laramie Cabs, Inc.,
700 P.2d 399 28

Frankel v. Cone, 214 Ga. 733,
107 S.E.2d 819 (1959) ... 23, 29, 30, 32

Fridlund Securities Co. v. Minnesota Commissioner of Revenue,
____ Minn. ____, 430 NW2d 154 27

Lloyd Adams v. Liberty Mut. Ins. Co.,
190 Ga 633, 641, 10 SE2d 46 33

Case Law (cont.)

Noreiga v. Schnurmacher Holding, Inc.,
528 So2d 28 28

R.B.F. Holding Co. v. Williamson,
260 Ga 526, 397 SE2d 440 36

LIST OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. Order of Superior Court of Chatham County, State of Georgia, dated July 31, 1990.
2. Opinion of Supreme Court of Georgia, dated June 7, 1991.
3. Order of Superior Court of Chatham County, State of Georgia, dated October 29, 1991.
4. Denial of Application for Discretionary Review, dated December 18, 1991.
5. Denial of Application for Reconsideration, dated January 8, 1992.

6. Amended Order of Denial of Application for Reconsideration, dated January 15, 1992.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked on the grounds that the Supreme Court of the State of Georgia has denied Appellant's Application for Discretionary Appeal, thereby making the Order of the Superior Court of Chatham County a final judgment, which is in conflict with the judgments of the Supreme Courts of sister states on similar statutes.

(i) **OCTOBER 29, 1991:** Order of the Superior Court of Chatham County, State of Georgia;

(ii) **DECEMBER 18, 1991; JANUARY 8, 1992 and JANUARY 15, 1992:** Supreme Court of the State of Georgia Denial of Application

for Discretionary Appeal, Denial of Application for Reconsideration, and Amended Denial of Application for Reconsideration, respectively.

(iii) **SUPREME COURT RULE 10.1.(b):** which provides for jurisdiction when final judgments of a state court of last resort has decided a question pertaining to the validity of a State statute on the ground that it is repugnant to the Constitution of the United States, conflicts with the decision of another state court of last resort.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED IN THE CASE

State of Georgia Revenue Regulation 560-12-2-.84(2)

"Additionally, lessees or rentees of taxicabs shall collect the tax on fares for transportation of persons in accordance with the uniform bracket system. Said lessees or rentees shall pay the tax on charges for the lease or rental of tangible property and fares collected for transportation of persons to their lessors or rentors and said lessors or rentors shall remit same to the State Revenue Commissioner."

(Underscoring provided for emphasis)

State of Georgia Revenue Regulation 560-12-2-.84(7)(b)

"Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term 'headquarters

operators' includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving and relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term 'taxicab lessors' includes any person or entity leasing a vehicle to another person or entity for use as a taxicab." (underscoring provided for emphasis)

Fifth Amendment to the Constitution of the United States of America

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property,

without due process of law; nor shall private property be taken for public use, without just compensation." (underscoring provided for emphasis)

Fourteenth Amendment to the Constitution of the United States of America

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (underscoring provided for emphasis)

Article I, Section I, Paragraph I of the Constitution of the State of Georgia

> *"Life, liberty, and property. No person shall be deprived of life, liberty, or property except by due process of law."* (underscoring provided for emphasis)

Article I, Section I, Paragraph II of the Constitution of the State of Georgia

> *"Protection to person and property, equal protection. Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."*

O.C.G.A. § 48-8-1

"It is the intention of the General Assembly in enacting this article to exercise its full and complete power to tax the retail purchase, retail sale, rental, storage, use, and consumption of tangible personal property and the services described in this article except to the extent prohibited by the Constitution of the United States and of this state and except to the extent of specific exemptions provided in this article."

STATEMENT OF THE CASE

This case involves the appeal of a tax assessment issued by the Georgia Department of Revenue against Adam Cab Company for failure to remit sales tax on fares for transportation to the Department of Revenue for the period January 1, 1986, through November 30, 1986. In its appeal of the Department of Revenue's assessment, Adam Cab Company challenged the constitutionality of Revenue Regulation 560-12-2-.84(7)(b) as well as the amount of the tax assessment.

In cross-motions for summary judgment, the parties asked the trial court to determine the validity of Revenue Regulation No. 560-12-2.-84(7)(b) as applied by the Department of Revenue in

assessing Adam Cab Company for failure to collect and remit sales tax on fares for transportation. In an order dated July 31, 1990, the lower court granted in part Adam Cab Company's motion for summary judgment and denied the State Revenue Commissioner's motion for partial summary judgment.

In its initial order the trial court, adopting an interpretation of the Regulation differing from that employed by the Department of Revenue, found that the Regulation required Adam Cab Company to collect from its drivers only that sales tax that its drivers "actually" collected from passengers. According to the court, the language of the Regulation places the responsibility for collection of sales tax

on those parties who deal directly with passengers or who otherwise have the opportunity to exercise control over the collection of taxes. Because the court found that Adam Cab Company did not deal directly with the passengers or have control over its drivers, the court concluded that Adam Cab Company was only responsible for collecting those sales taxes which were actually collected by the drivers.

In denying the State Revenue Commissioner's motion for partial summary judgment, the court found that the State Revenue Commissioner erred in interpreting the Regulation as making Adam Cab Company responsible for collecting sales tax on all fares for transportation regardless of

whether its drivers collected the sales tax. Based upon its interpretation of the Regulation, the Court concluded that it did not need to address the constitutional challenge raised by Adam Cab Company's appeal and briefed in the parties' summary judgment briefs.

In the Supreme Court of Georgia's initial ruling (***Collins, Commr. v. Adam Cab, Inc., d/b/a Adam Cab Co.***, 261 Ga. 305, 404 SE2d 560) it held that the appellant qualified as a headquarters operator and a taxi cab lessor under the amended Regulation and required Adam Cab Company to remit to the State Revenue Commissioner the tax on fares actually collected by its independent contractor drivers. Holding that public policy was

not considered (by the lower Court) and the need to collect the tax on fares for transportation of customers and the impracticability or impossibility of the taxi cab drivers collecting and remitting the fares warranted the Court holding that the Regulation is valid and Adam Cab Company was bound by it. However, the Court in Division Two ruled as follows: "Our ruling in Division One does not require the grant of summary judgment to Appellant. This case must be remanded to the trial Court for consideration and resolution of the Constitutional issues raised by Appellee but not ruled upon by the trial court.

After remand the trial court held that the Regulation is constitutional

stating that the case of ***Frankel v. Cone***, 214 Ga. 733, as presented by the Appellant raised "interesting issues, this court, without further guidance from the higher courts of this state, is not in a position to apply [it] . . . to taxes."

Appellant thereafter filed an Application for Discretionary Appeal in the Supreme Court of Georgia, which was denied by a vote of four to three. The dissenting Justices included the Chief Justice, the presiding Justice and a third Justice. [A copy of this unpublished opinion is attached as Appendix D]

On Motion for Reconsideration, the Court voted to deny the Motion for Reconsideration (which was subsequently

amended). [Copies of this opinion and its amendment are attached as Appendix E and Appendix F respectively]

The constitutionality of the subject Regulations was first raised in the Appellant's initial Appeal to the Superior Court of Chatham County, State of Georgia as Paragraph 2 thereof, reading [in pertinent part]:

> "2. Basing an assessment against Appellant under an apparent "misinterpretation" of the above quoted portion of the Regulations is unconstitutional under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I,

Section I, Paragraphs I and II of the Constitution of the State of Georgia, in that it is a deprivation of property without due process [i.e., holding Appellant liable for taxes on fares which are properly collectible and payable by the independent contractor "lessees" of the Appellant's vehicles, under the provisions of Regulation 560-12-2-.84(2)], ..."

ARGUMENT FOR GRANTING THE WRIT

This Court should grant certiorari because the Georgia Supreme Court has erroneously required taxi cab companies with leasehold drivers to be responsible for the collection and remittance of sales tax on passenger fares upon the companies rather than the drivers. This ignores the practical operation of the industry, namely, the operators are not subject to the company's right to direct the time, the manner, the methods and the means of execution of the work; the companies cannot compel the taxi cab drivers by agreement, policy or law to report the fares to the company and most important most passengers refuse to pay the sales tax when requested by the drivers. (See

Affidavits of Hendrix and Sapp, leasehold drivers, Appendix G and H respectively) Therefore, the companies are being held responsible for the improper conduct of another and are thereby being deprived of their property in violation of the due process clauses of the United States and the State of Georgia Constitutions. The decision is in conflict with other laws in the State of Georgia and the issues are of far reaching importance as they thereby create a conflict between Georgia and contrary rulings in:

MINNESOTA: *Corbin v. Commissioner*, 307 Minn. 237, 240 NW2d 809; *Fridlund Securities Co. v. Minnesota Commissioner of Revenue*, ____ Minn. _____, 430 NW2d 154;

WYOMING: *Employment Security Commissioner of Wyoming v. Laramie Cabs, Inc.*, 700 P.2d 399;

FLORIDA: *Noreiga v. Schnurmacher Holding, Inc.*, 528 SO2d 28); and,

ALABAMA: *Alabama v. Advertiser Co.*, 337 SO2d 942).

Revenue Regulation 560-12-2-.84(7)(b) is unconstitutional in that it deprives taxi cab companies of their property without due process of law in that taxi cab companies are held liable for the improper conduct of independent contractors over whom they have no right or opportunity or authority to exercise control nor the authority to require them to report their fares, to collect taxes or to pay the taxes if any are collected.

The Regulation is in violation of the due process clauses of the United States and State of Georgia Constitutions. This argument was presented in the pleadings and brief in the lower court.

The Supreme Court of Georgia has ruled that other legislation which had the same effect, was unconstitutional. ***Frankel v. Cone***, 214 Ga. 733. The statue in question in the cited case made the owner of a motor vehicle liable if the vehicle was used for the prosecution of the business of or for the benefit of such owner even though operated without the owner's knowledge or consent, express or implied. Former Ga. Code Ann., 68-301. The court stated, "In our opinion, the act clearly violates the due process

clause of both the Federal and State Constitutions for the reason that it makes the owner of a motor vehicle liable if the vehicle is being used in the prosecution of the business of or for the benefit of such owner, even though operated without notice to her or without her knowledge or without her consent express or implied. To hold this statute constitutional, would be to hold a party liable for the negligent act of another, even though a trespasser was operating the vehicle against the express orders of the owner, and irrespective of how careful or free from negligence the owner was, the only condition being that it be operated for the benefit of the owner. ***Frankel v. Cone***, 214 Ga. 733, at Page 736.

Similar rulings included the case of ***Corley v. Lewless***, 227 Ga. 745, where this Court held that a statute imposing liability on a parent for wilful and wanton acts of a minor child was unconstitutional. The opinion stated that Georgia Code Ann. 105-113 violated the due process clause of the State and Federal Constitutions. In that case the court stated, "It (Ga. Code Ann. 105-113) imposes vicarious tort liability solely on the basis of the parent child relationship. The requirements that the parents have "custody and control" over the child and that the child's act be wilful and wanton, do not alter the fact that merely because of the relationship of parent and child, a tort liability is

created which otherwise would not exist. It would not matter that the parent was entirely free from negligence or fault or even that he had no knowledge of his child's tort. This was held to be unconstitutional. The Court discussed the rulings in several other cases including ***Frankel v. Cone*** which has been discussed. The court also stated, "In ***Buchanan v. Heath***, 210 Ga. 410, 80 SE2d 393, we held unconstitutional a statute (Ga. Code Ann. 94-707) which made a railroad section foreman liable to pay owners double the value of stock killed on his section for his failure to file a list of the marks and plans of the stock killed, irrespective of whether he had knowledge that the stock had been killed. We held

that the due process clauses of the State and Federal Constitution were violated because the section foreman was automatically made liable by his failure to file a list of stock killed, regardless of any mitigating circumstances which might exist. . . . liability was created solely by virtue of the statue, regardless of whether the section foreman was at fault or even had knowledge that stock had been killed. Also applicable is the ruling in ***Lloyd Adams, Inc. v. Liberty Mut. Ins. Co.***, 190 Ga. 633, 641; 10 SE2d 46, 51, where this court stated: 'To allow any recovery on the basis stated by the statute would deprive the defendant of property without due process of law, would authorize a recovery without

liability, and would compel payment without fault.' These cases are controlling and in our opinion Ga. Code Ann. 105-113 contravenes the due process clauses of the State and Federal Constitutions. (Ga Code Ann. §§1-815, 2-103, Constitution, Article I, Section I, Paragraph 3) and is void." ***Corley v. Lewless***, 227 Ga. 745, 750-1, 182 SE2d 766, 770.

The Supreme Court of Georgia's ruling of June 7, 1991, implies either that the owners have control of some type over the leaseholder drivers or are capable of paying the tax themselves. Yet, the Georgia Court of Appeals expressly stated in Workers' Compensation law a taxi cab driver who rented the cab company's

vehicle and retained all money collected as fares with the company maintaining and insuring the cab with the claimant buying the gasoline was not an employee within the Workers' Compensation law even though the bailment could be terminated at any time. ***Cole v. Peachtree Cab Co.***, 121 Ga. App. 177, 173 SE2d 278. There is no doubt that the driver in this and the cited case was an independent contractor. For "the true test whether a person employed under the contract, whether oral or written has a right to direct the time, the manner, the methods and the means of the execution of the work as contra-distinguished from the right to insist upon the contractor producing results according to the contract or

whether the contractor in the performance of the work contracted for is free from any control by the employer of the time, manner and method of the performance of the work . . . the right to control the manner and method means the right to tell the employee how he shall go about doing the job in every detail including what tools he shall use and what procedures he shall follow." ***R.B.F. Holding Co. v. Williamson***, 260 Ga.526, 397 SE2d 440, 441. The opinion in ***Collins, Commissioner, v. Adam Cab***, Id., puts the taxi cab company in a position that could only be maintained by having the operator as an employee. This has created a divergence in the interpretation of an independent contractor as it applies to taxi cab

lessees in Workers' Compensation and Public Revenue law. For the Revenue Commissioner to contend the taxi cab company should pay the taxes whether collected and turned in to the company or not is contrary to the United States and Georgia Constitutions by taking the property without due process of law. Likewise, the Regulation holds the taxi cab company liable irrespective of whether the taxi cab company had knowledge of whether the driver charged or collected fares and charged or collected sales taxes. Likewise, the Regulation creates a liability on the taxi cab companies regardless of any mitigating circumstances but solely by virtue of the Regulation. It is submitted that to

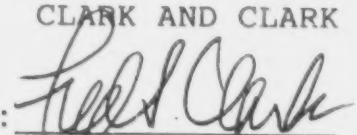
allow the Regulation to be declared constitutional would create a dichotomy of law and would deprive the Appellant of property without due process of law and would authorize payment without liability and compel payment without fault, all of which was prohibited by this Court.

This case is important to all taxi cab companies in the State of Georgia who lease their cabs to independent contractor operators in that it places a burden on the companies to collect taxes from independent contractors over whom they have no right or opportunity or authority to exercise control nor the authority to require them to report their fares, to collect the taxes or to pay the taxes if any are collected.

In addition, it is important to nullify the dichotomy among the States created by the Supreme Court of Georgia.

Respectfully submitted,

CLARK AND CLARK

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Petition for Certiorari, to the below named individuals by depositing same in the United States Mail, with adequate postage affixed thereto:

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This the 7th day of February, 1992.

Fred S. Clark